



2003 - 232

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

BILL PRYOR
ATTORNEY GENERAL

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, AL 36130
(334) 242-7300
WWW.AGO.STATE.AL.US

August 28, 2003

Honorable Ed Richardson
State Superintendent
Department of Education
P.O. Box 302101
5103 Gordon Persons Building
Montgomery, AL 36130-2101

Honorable Jim Carns
Minority Leader
Alabama House of Representatives
Alabama State House
Montgomery, AL 36130

Department of Education – Funds –
Taxes – Referendum Election – Schools

Alabama's public school systems and public colleges and universities may expend public funds, which are not otherwise restricted, and use public property to advocate on behalf of the Alabama Excellence initiatives with communities, alumni, faculty, students, and other friends of the public school systems and colleges and universities, if the State Board of Education, the local boards of education, or the boards of trustees determine that this expenditure serves a public purpose.

Dear Dr. Richardson and Representative Carns:

This opinion of the Attorney General is issued in response to your requests and is addressed in one opinion because the answers to your questions are substantially the same.

QUESTION

May Alabama's public school systems and public colleges and universities directly expend public funds, which are not otherwise restricted, and use other public property to advocate via electronic mail transmissions, telephone, meetings, regular mail, or other similar methods, with communities, alumni, faculty, students, or other friends of the public school systems and colleges and universities on behalf of the proposed Alabama Excellence initiatives that will be on the ballot on September 9, 2003?

FACTS AND ANALYSIS

During the recently completed extraordinary session of the Legislature, the Legislature enacted a package of nine accountability measures, nine measures to reform Alabama's tax structure, and a constitutional amendment. The bills become effective only upon ratification of a constitutional amendment by the voters at an election scheduled for September 9, 2003. Public school systems and colleges and universities have expressed a desire to advocate in support of the passage of the constitutional amendment and have promoted the passage of the amendment.

This Office has held that a local board of education may expend public funds to hire a lobbyist, if the board determines that the proper interests of the board are involved. Opinion to Honorable Donald B. Sweeney, Jr., Attorney, Mountain Brook City Board of Education, dated September 22, 1997, A.G. No. 97-00288. In the *Sweeney* opinion, this Office stated that a local board of education is granted broad authority to promote the interest of the schools in its jurisdiction. *Id.* at 2. This Office opined that inherent in that broad grant of authority was the advocacy of certain legislative measures that would assist the school district. *Id.* at 4. This analysis is applicable to the expenditure of public school funds for the purpose of providing the citizens of this State with information as to how an issue on the ballot will affect the public school system.

The State Board of Education, through the State Superintendent of Education, exercises general control and supervision over the public

schools of the state, except institutions of higher learning. ALA. CODE § 16-3-11 (2001). The board is given broad power to consult and advise city and county boards of education, school superintendents, school trustees, principals, teachers, supervisors, and interested citizens; and to seek in every way to direct and develop public sentiment in support of public education. *Id.*; see also ALA. CODE §§ 16-4-4, 16-4-6, 16-4-8 (2001) (additional powers granted to the state superintendent of education). Both county boards of education and city boards of education are given general administrative authority and supervision over their respective school systems. ALA. CODE §§ 16-8-8 and 16-11-9 (2001).

This Office has previously held that a university may support and provide funds to support activities that further the university's purposes and mission. Opinion to Honorable Frederick P. Whiddon, Office of the President, University of South Alabama, dated July 6, 1995, A.G. No. 95-00251. Colleges and universities are ordinarily managed and controlled by a board of trustees. The board is given broad power to do all things that the board determines is necessary to operate and manage the institution and to promote the interest of the institution. See ALA. CODE §§ 16-47-2, 16-48-2, 16-49-22, 16-50-24, 16-51-6, 16-52-7, 16-53-6, 16-54-3, 16-55-4, 16-56-2, and 16-60-111.4 (2001). Public school systems and public universities and colleges routinely spend funds to hire lobbyists to educate the Legislature with respect to their funding needs, and this Office sees no legal distinction between that activity and spending funds to educate voters in the context of a constitutional amendment.

In addition to the general powers given to colleges and universities and the public school systems, section 93 of the Constitution of Alabama, as amended, has been interpreted as allowing the use of public funds in aid of an individual, association, or corporation if the expenditure is for a public purpose. *Slawson v. Ala. Forestry Comm.*, 631 So. 2d 953 (1994); Opinion to Honorable Jack Hawkins, Jr., Chancellor, Troy State University, dated June 28, 1999, A.G. No. 99-00235. Whether an expenditure serves a public purpose has been stated as follows:

[G]enerally speaking, a public purpose "has for its objective the promotion of public health, safety, morals, security, prosperity, contentment, and the general welfare of the community. . . ."

"The paramount test should be whether the expenditure confers a direct public

benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit. . . . The trend among the modern courts is to give the term 'public purpose' a broad expansive definition."

Slawson at 956 (citations omitted).

Each public school system and each college or university must determine whether the expenditure of funds for the promotion of a particular ballot issue meets this public purpose test. Accordingly, if the state board of education, the local board of education, or the board or management of a university determines that the passage of a particular ballot issue is beneficial to the interests of the public school system or the university or that the expenditure of public funds to support that issue serves a public purpose, the public school system or the university may expend public funds or use other public property to advocate the proposed initiatives with its community, alumni, faculty, students, or other friends of the public school system and the university.

Section 17-1-7 of the Code of Alabama concerns the right of city, county, and state employees to participate in political activities and the improper use of state property or time for political activities. ALA. CODE § 17-1-7 (1995). The portions of section 17-1-7 pertinent to this opinion provide as follows:

(b) No person shall attempt to use his or her official authority or position for the purpose of influencing the vote or political action of any person. Any person who violates this subsection (b) shall be guilty of a felony and punishable by a fine not to exceed ten thousand dollars (\$10,000) or imprisonment in the state penitentiary for a period not to exceed two years, or both.

(c) No person in the employment of the State of Alabama, a county, or a city whether classified or unclassified, shall use any state, county, or city funds, property or time, for any political activities. Any person who is in the

employment of the State of Alabama, a county, or a city shall be on approved leave to engage in political action or the person shall be on personal time before or after work and on holidays. It shall be unlawful for any officer or employee to solicit any type of political campaign contributions from other employees who work for the officer or employee in a subordinate capacity. It shall also be unlawful for any officer or employee to coerce or attempt to coerce any subordinate employee to work in any capacity in any political campaign or cause. Any person who violates this section shall be guilty of the crime of trading in public office and upon conviction thereof, shall be fined or sentenced, or both, as provided by Section 13A-10-63.

ALA. CODE § 17-1-7 (1995).

In an opinion to Governor Fob James, this Office held that the Governor is not prohibited by section 17-1-7 of the Code of Alabama from educating the voters of this state on issues of public importance. Opinion to Honorable Fob James, Jr., Governor, State of Alabama, dated June 14, 1996, A.G. No. 96-00242. In that opinion, the Governor asked whether he and his staff could educate the voters by telephone and mail about three constitutional amendments concerning court reform that were to be on the ballot and encourage them to vote to ratify the amendments. As cited in that opinion, the Governor has the authority in section 123 of the Constitution of Alabama to educate legislators and voters about legislative measures needed for the good of the State. *Id.*

The *James* opinion also reviewed the legislative purpose for enacting section 17-1-7 of the Code of Alabama. Act 78-819, which amended section 17-1-7, stated the purpose of the Act as follows:

To remove all restrictions relating to Public Employees of any County or City in the State of Alabama, pertaining to his right to participate in certain political activities and allow public employees the right of free expression in public welfare.

1978 Ala. Acts No. 78-819, 1194.

The *James* opinion stated that subsection (b) of section 17-1-7 is aimed at officials who try to put undue influence on persons under their control by offering a reward or threat of reprisal for voting in a certain way. A.G. No. 96-00242 at 3. The purpose of section 17-1-7 is to allow public employees to participate in political activities, as do other citizens, without the fear of censure or reprisal from persons that have authority over their job security. *Id.*

Although section 17-1-7 relates to political activities involving candidates, it must be read in pari materia with section 17-22A-16, which states as follows:

It shall be unlawful for any person to obstruct, intimidate, threaten or coerce any other person to vote or to vote as he or she may choose, or for the purpose of causing such other person to vote for, or not to vote for, any candidate for state or local office or *any other proposition* at any election.

ALA. CODE § 17-22A-16 (1995) (emphasis added). This section prohibits any person from interfering with the right of another person to vote as he or she chooses with respect to a proposition on the ballot, such as a constitutional amendment. Thus, although public officials and employees may promote a constitutional amendment, they may not interfere, by threat or coercion, with the right of any person, including another public official or employee, to vote as he or she chooses.

Section 17-1-7 prohibits a public official or employee from using public property or time to support a particular candidate or political party. This section does not prohibit, however, the Governor, other public officials, or employees from promoting to the voters constitutional amendments on the ballot that the Governor or other public officials determine to be beneficial to the State. This form of voter lobbying is legally permissible.

The inapplicability of section 17-1-7 turns on the definition of "political activity." The Alabama Supreme Court has held that "political activity" does not include petitioning for the passage of an ordinance. *Hudson v Gray*, 285 Ala. 546, 234 So. 2d 564 (1970). In that case, city

employees were prohibited by a civil service act from taking part in any political campaign, except privately to express their political opinion and to vote. *Hudson*, 285 Ala. at 547, 234 So. 2d at 565. The city employees were signing and circulating a petition to the city seeking the passage of a particular ordinance by the city or the calling of an election by the city for that purpose. *Id.* The Court held that “circulating and filing the petition as a condition precedent to engaging the power of initiative action is not to be construed as political activity or taking part in a political campaign under the civil service law.” *Hudson*, 285 Ala. at 549, 235 So. 2d at 567.

The United States Court of Appeals for the Eighth Circuit considered the definition of “political purpose” as used in a Missouri statute and cited *Hudson v. Gray* as authority for interpreting “politics” as involving either candidates or partisan elections. *Bauers v. Cornett*, 865 F. 2d 1517, 1525 (8th Cir. 1989). The Missouri statute, applicable to public employees in Missouri, provided that “[n]o person shall in any manner levy or solicit financial assistance or subscription for any political party, candidate, political fund, or publication, or for any other *political purpose*, from any employee in a position subject to this law.” *Id.* (emphasis in original). The Court held that the Missouri statute was limited to “elections where political parties played a substantial role, such as elections where candidates are sponsored by political parties, or where elections are otherwise nonpartisan in name only.” *Id.*

Another provision of state law related to this issue is section 36-12-60, *et seq.*, of the Code of Alabama, which prohibits the use of state-owned property to advance the interest of any candidate for public office. ALA. CODE § 36-12-60, *et seq.* (2001). These prohibitions are located in article 4 of chapter 12 of title 36 under the title “use of state-owned property for political purposes.” Although the title of the article refers to “political purposes,” the actual prohibitions in the article are against using state property for campaigns involving candidates, not ballot propositions.

In *Alabama Libertarian Party v. City of Birmingham*, 694 F. Supp. 814 (N. D. Ala. 1988), a group of taxpayers and a political party challenged the City of Birmingham’s use of tax funds for advertising to promote the passage of a property tax in the city, asserting that it violated the First Amendment right of association. The Court held that the city’s advertising campaign did not violate the First Amendment, finding that the advertising was not political or ideological in nature and not a case

where public funds were used to support a particular candidate, doctrine, or ideology. *Id.* at 817. The Court agreed with the city that it had the right to advise its citizens of the benefits to be received as a result of the proposed ballot issues and to express its support for approval of those issues. *Id.* at 820. The city made a finding that it needed additional funds and that it should seek the support of its citizens in acquiring these funds. The Court ruled that this activity is a public function. *Id.* at 818.

The definition of “political activity” and “lobbying” as used in federal law in the context of permitted activities by tax-exempt organizations is persuasive. Tax-exempt nonprofit organizations organized under 501(c)(3) of the Internal Revenue Code are generally permitted to “lobby” to some extent, but are absolutely prohibited from engaging in “political activity.” I.R.C. § 501(c)(3) (2002). “Lobbying” is described in the Internal Revenue Code as “carrying on propaganda, or otherwise attempting to, influence legislation,” while “political activity” is described as “to participate in, or intervene any political campaign on behalf of (or in opposition to) *any candidate* for public office.” *Id.* (emphasis added). This distinction has been explained as allowing 501(c)(3) organizations “to take sides with respect to political issues, but not political candidates.” Eric Mercer, *Lobbying and Political Activity by Tax-Exempt Organizations*, *Online Compendium of Federal and State Regulations for U.S. Nonprofit Organizations* (May 6, 1999), <http://www.muridae.com/nporegulation/lobbying.html>.

The term “influencing legislation” is defined in the Internal Revenue Code to mean the following:

“any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof and attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.”

I.R.C § 4911(d) (2002). “Legislation” as used in this section includes “action with respect to Acts, bills, resolutions, or similar items by the Congress, any State legislature, any local council, or similar governing body, *or by the public in a referendum, initiative, constitutional amendment, or similar procedure.*” I.R.C. § 4911(e)(2) (2002) (emphasis

added). Thus, tax-exempt organizations are authorized, to some extent, to promote ballot referendum issues, but may not engage in "political activity," which is defined as activity on behalf of or in opposition to candidates.

This opinion should not be viewed as authority for a public school system or a college or university to contribute public funds to a political committee that supports candidates or is involved in partisan campaigns. This activity would violate section 17-1-7 of the Code of Alabama. Accordingly, it is the opinion of this Office that public school systems and colleges and universities in Alabama may use public funds, not otherwise restricted, and other public property to seek support for ballot initiatives, if the State Board of Education, the local board of education, or the board of trustees of the college or university determines that the promotion of those ballot initiatives furthers the purposes and missions of the public school system or the college and university or serves a public purpose.

The Fair Campaign Practices Act ("FCPA") provides that any committee or group of one or more persons that receives or anticipates receiving contributions or makes or anticipates making expenditures to expressly promote or defeat a proposition is a political committee and must comply with the reporting requirements of that act if the contributions or expenditures exceed \$1000. ALA. CODE §§ 17-22A-2(10), 17-22A-5, 17-22A-8 (1995, Supp. 2002). A public entity, such as the State Board of Education, a local board of education, or a public university, is not a "person" as that term is defined in the FCPA. "Persons" is defined in the act as private entities: "[a]n individual, partnership, committee, association, corporation, labor, organization, or any other organization or group of persons." ALA. CODE § 17-22A-2(8) (Supp. 2002). Thus, public entities are not subject to the requirements of the FCPA.

The records of public entities are, of course, subject to disclosure under section 36-12-40 of the Code of Alabama, which gives every citizen a right to inspect and copy any public writing, unless expressly prohibited by statute. ALA. CODE § 36-12-40 (2001). Public records are defined in section 41-13-1 of the Code of Alabama to include all written, typed, or printed documents made or received in the transaction of public business. ALA. CODE § 41-13-1 (2000). Accordingly, the funds expended by a public entity with respect to a ballot proposition are subject to public inspection, but not through reports under the FCPA.

Honorable Ed Richardson
Honorable Jim Carns
Page 10

Two opinions of former Attorney General Evans, which are inconsistent with this opinion, Opinion to Honorable William D. Scruggs, Attorney, DeKalb County Board of Education, dated June 8, 1993, A.G. No. 93-00234, and to Honorable Broox G. Garrett, Jr., Attorney, Brewton City Board of Education, dated March 20, 1991, A.G. No. 91-00193, are hereby overruled. The opinion of Attorney General Sessions to Honorable Fob James, Jr., Governor, State of Alabama, dated June 14, 1996, A.G. No. 96-00242, and my opinion to Honorable Donald B. Sweeney, Jr., Attorney, Mountain Brook City Board of Education, dated September 22, 1997, A.G. No. 97-00288, are reaffirmed.

CONCLUSION

Alabama's public school systems and public colleges and universities may expend public funds, which are not otherwise restricted, and use public property to advocate on behalf of the Alabama Excellence initiatives with communities, alumni, faculty, students, and other friends of the public school systems and colleges and universities, if the State Board of Education, the local boards of education, or the boards of trustees determine that this expenditure serves a public purpose.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Brenda F. Smith of my staff.

Sincerely,

BILL PRYOR
Attorney General

By:

A handwritten signature in black ink that reads "Carol Jean Smith". The signature is written in a cursive, flowing style.

CAROL JEAN SMITH
Chief, Opinions Division

BP/BFS
117177v1/57988